2009

Robinson v. Robinson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JODY G. ROBINSON, Petitioner vs. EVERETT D. ROBINSON, Respondent	**REPLY BRIEF OF THE APPELLANT** Appellate Case No. 20090007 District Court Nos. 084400917 and 084401994 by appeal from the Fourth Judicial District Court of Utah County in the State of Utah Judges Claudia Laycock and James R. Taylor with Commissioner Thomas Patton

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On the Compact Disc are a copy of the Appellant's Brief with Addendum, the Appellee's Brief, this Reply Brief, all in PDF Format.

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The Appellant/Respondent (hereinafter the "Husband") alleges that the Protective Order that issued on December 19, 2008 to the Appellee/Petitioner (hereinafter the "Wife") against the Husband is improper for at least four reasons. First, the Husband was denied due process in that he was not granted an opportunity to object to that order, where it had been broadened by the Wife beyond what was ordered at the hearing from which it originated on November 17, 2008. The Wife rebuts that her failure to send a proposed order is not reversible error, and the differences between the oral and written orders is harmless error. The Husband responds that the order was indisputably enlarged in seven significant ways not "harmless error", and that Utah Code § 78B-7-106(3) authorizes modification of a protective order only "after notice and a hearing", regardless of whether those modifications are significant, both of which the Husband was denied.

The second reason the Protective Order is improper is because it was issued by a court commissioner with a mere ratification by a judge; as the order was broadened, it must be that insufficient judicial oversight was engaged in the issuance thereof. This is a violation of Rule 6-401 of the Utah Judicial Council Rules of Judicial Administration and the performance of a non-delegable judicial act by an appointed commissioner. The Wife rebuts that what was issued at the November 17, 2008 hearing was actually a commissioner's recommendation, and that as the Husband did not object within the 10 day period of Rule 7(g) of the Utah Rules of Civil Procedure regarding commissioner's

recommendations, the Court was required to enter the Order because the Husband affirmatively waived his right to object. The Wife further alleges that the objections were not specifically and timely raised in the District Court. The Husband responds that the "grant" of an order issued at that hearing was not identified as a recommendation, nor was it treated by the Court as a recommendation, and further is nothing in the record to show that the Commissioner's order was reviewed by a judge, and the signatures of the judges appearing on the orders of Nov. 17 and Dec. 19 are mere ratifications prohibited by *Holm v. Smilowitz* 840 P.2d 157,160 (Utah 1992.) The Husband shows that his objections were timely, specifically and appropriately made, and regardless, the Court is required to provide judicial review even if no objections are filed under *State v. Thomas*, 961 P.2d 299 (Utah 1998.)

The third reason the Protective Order is improper is that the process undertaken by the Commissioner and the District Court was not fundamentally fair, as required by Utah Code § 62A-4a-201(1)(a) when parental rights are involved. Judge Taylor summarily dismissed the Husband's motions to vacate that Protective Order and his objections thereto.

The fourth reason the Protective Order is improper is that it was granted on insufficient grounds, because it relied on: (1) a plea of nolo contendere made in abeyance in violation of Rule 410 of the Utah Rules of Evidence, (2) an incorrect interpretation of an earlier protective order between the Husband and the Wife for which the Husband was found to have violated, and (3) an erroneous finding that the Husband had placed the

Wife in fear of domestic violence, for a purported invasion of her "personal space" and relying on a finding that the Husband's rebuttal was less credible than the Wife's allegations in the face of significant documentary evidence of domestic violence by the Wife supplied by the husband. The Wife rebuts that the Husband did not challenge the validity of the underlying protective order of June 11, 2008. The Husband replies that that order was stipulated to without a finding of fault, and provides no grounds for the issuance of a subsequent protective order. The Wife further rebuts (1) that the plea of nolo contendere was admissible evidence for analogous reasons as UCA § 77-36-1.1(3). The Husband responds that that section is expressly limited to penalty enhancements, and further that the Wife's position is contrary to *D.A. v. State of Utah*, 63 P.3d 607, 617 (Utah 2002). The Wife further rebuts (2) and (3) that the trial court made detailed and well-reasoned findings and further that the Husband failed to "marshal evidence" to show that he did not violate the protective order nor place the Wife in fear of imminent harm. The Husband responds that the burden of proof is on the Wife to show that the protective order was violated and that the Wife was placed in fear of domestic violence. The Husband further responds that the Court's interpretation of the protective order rendered the document self-conflicting, and that under the correct interpretation no violation occurred. The Husband further responds that neither the Court nor the Wife identified an event where the Wife was placed in actual fear of domestic violence.

The Husband argues that the Protective Order was too broad. Utah Code § 78B-7-106(3) authorizes "an order for protection", the provisions of which must serve to

reasonably protect a petitioner from a substantial and definite harm. The Husband showed that all and specific provisions of the Protective Order did not serve to prevent abuse or domestic violence. The Husband further argued that Utah Code § 62A-4a-201(1)(a) "may not exceed the least restrictive means or alternatives available" was violated with respect to his parental rights. The Wife rebuts that the Husband's arguments are improper, and that Utah Code § 62A-4a-201(1)(a) was misread. The Wife then argues that because Utah Code § 78B-7-106(3) is constitutional citing *State v. Hardy*, 2002 UT App 244, 53 P.3d 645, and that under "similar reasoning", the Protective Order was not overbroad. The Husband replies that *Hardy* actually reinforces his position, because it states that with regard to particular protective orders, in the absence of previous instances of domestic violence or abuse, or a substantial likelihood thereof, "the court may not restrict the protective order respondent's right".

Finally, the Husband petitioned for a protective order against the Wife. The District Court erroneously dismissed that petition under Utah Code § 78B-7-108 without the required due process hearing. The Husband showed that the Wife's assaults were made in other than self-defense, and the Husband is entitled to a protective order under Utah Code § 78B-7-103. The Wife rebuts that the Husband did not file a request for a protective order under a separate case number. The Husband responds that § 78B-7-108 requires only an independent petition, not an independent case, which he met.

V. Argument

A. Rebuttal to the Appellee's Argument

1. The Husband Objected to the Issuance of the Protective Orders, and Preserved the Issues for Appeal.

a. The Husband timely objected to the Commissioner's order.

The Wife repeatedly argues that the order orally issued by Commissioner Patton from the bench on November 17, 2008 was a commissioner's recommendation, and Rule 7(g) of the Utah Rules of Civil Procedure prohibits the Husband's objections after ten days. That is incorrect for several reasons.

First, the order of November 17, 2008 was not a recommendation, nor is there anything in the record that appears that could possibly be a recommendation. The District Court did not identify the order of Nov. 17 as a recommendation, but rather as a grant (Appellant's brief, pg. 24, 2nd paragraph: "I'm granting your client a protective order" (Ex. M pg. 3 fourth full paragraph), "the Court grants the Protective Order." (Ex. H pgs. 2&4.)) Nothing issued by the Court is identified as a "recommendation", and the word "recommend" does not appear in any paper issuing from the Court, nor any form of that word.

Furthermore, the Court did not treat that Order as a recommendation. There is nothing in the record that shows that the Judge Taylor, for the oral order of Nov. 17, nor Judge Laycock, for the written order of Dec. 19, 2008, did anything but simply sign and ratify. The record shows that the order of Nov. 17 was ratified by Judge Taylor in a minute entry in case no. 084400917 (Ex. H, pg. 2), that ratification on the page bearing the date of Nov. 21, 2008, four days after the hearing. That minute entry states that "the Court grants the Protective Order". Therefore, it is clear from the record that the District Court did not give the Husband 10 days to object to a recommendation, as would have been required under URCP 7(g), and therefore even the Court did not consider the Commissioner's oral order to be a recommendation.

There is nothing to show that any judicial officer performed any review of the record to consider the propriety of the orders issued. In fact, record shows that at least for the written order of Dec. 19, an insufficient review was made because of the several enlargements in that order. (Appellant's brief pgs. 27 and 23.)

Contrary to what the Wife claims, the Husband does not concede that he did not file an objection within ten days of a commissioner's recommendation, because no recommendation was issued by the Commissioner. Regardless, the Husband has shown that he took all reasonable steps to be timely in making his objections. (Appellant's brief, pgs 25-26.) The Wife points to Utah Code Ann. § 30-6-4.3 (renumbered to 78B-7-107 in 2008) and URCP 7(g) to argue that the Husband was not timely. However, neither that rule nor that statute prohibits objections made after the 10-day period, but merely provide

a sanctioned method of making an objection. The principles of fairness and due process would require that application of a time period be preceded by notice to the affected party, and here the Court did not inform the Husband that a recommendation was being made. The Wife's interpretation of *Buck v. Robinson* (2008 UT App 28) is incorrect; that only spoke to the constitutionality of the statutes and rules regarding court commissioners, and does not show that a Judge is required to enter a final judgment from a commissioner's recommendation if an objection is not timely made. Thus, even if the order of Nov. 17 was a commissioner's recommendation, the Wife's arguments of untimeliness are misplaced.

Regardless of whether an objection is made, a judge is required to exercise judicial power for any core judicial function. *State v. Thomas*, 961 P.2d 299 (Utah 1998.) In that case, the Utah Supreme Court restated that core judicial functions include "the power to hear and determine controversies between adverse parties and questions in litigation" and further that "core judicial functions do not include functions that are generally designed to 'assist' courts, such as conducting fact finding hearings, holding pretrial conferences, and making recommendations to judges. In these instances, the commissioners' actions are reviewable by a judge; thus, ultimate judicial power remains with the judge." (Id. pg. 302, citing *Salt Lake City v. Ohms*, 881 P.2d 884 (Utah 1994.)) To hear and determine a controversy requires the taking, reviewing, and deciding on the evidence presented, and commissioners may constitutionally make recommendations precisely for the reason that they are to be reviewed by a judge. The presence of the signature of a judge appearing on

the orders is not sufficient; this Court has ruled that the ratification by a judge of a commissioner's order while relying on the commissioner's discretion is an impermissible delegation of judicial power. (*Holm v. Smilowitz*, 840 P.2d 157, 168.) The Husband has shown that at least Judge Laycock did not review the final written order, as evidenced by the at least seven discrepancies within. (Appellant's brief pgs. 27 and 23.) It is clearly apparent that Utah Code § 78B-7-107 in 2008 and URCP 7(g) exist so that a respondent will be provided an opportunity to apprise a judge of the controversies remaining at the time a commissioner's recommendation is made, allowing the judge to provide the judicial review required by *State v. Thomas*. Judge Taylor was not present at the Nov. 17th hearing, and he did not "hear" the controversy, nor did he hear the Husband's objections prior to the application of his signature stamp four days later. The Husband was not accorded an opportunity to object to the grounds stated by the Commissioner in the Nov. 17th hearing until well after Judge Taylor applied his signature. Furthermore, the only acts that appear in the record by a judge are the application of the signature stamps of Judges Taylor and Laycock on the orders of May 13, Nov. 17 and Dec. 19, 2008, and there is nothing in the record that shows that any judge reviewed any of the evidence presented, Commissioner Patton's acts, or the grounds therefor as required by *State v. Thomas*.

As to the Wife's footnote quotation in *Thomas v. Thomas*, 2004 UT App 440, the text continues "we need not decide that issue today", and has no precedential value.

Furthermore, the Wife admits that the Husband's objections were filed, and therefore he cannot be deemed to have affirmatively waived his defenses.

b. The Husband preserved the issues for appeal.

The Wife claims that the objections filed by the Husband on January 8, 2009 were inoperative as an objection to the Commissioner's "recommendation" because (1) they were untimely, (2) they were "a generalized objection to the format of the final protective order and other grievances", and (3) impliedly the Wife alleges that effective objections were not elsewhere raised, referring to criteria one and two of the test in *Badger v. Brooklyn Canal Co.* (966 P.2d 844, 847). The issue of timeliness is addressed above; the Husband cannot be held to a ten-day time period where he was not given notice of a commissioner's recommendation, and furthermore he requested waiver of the ten-day rule on several grounds (Ex. M, pgs. 1&2, Appellant's brief, pg. 26.)

The Husband met criteria one of the Badger test. The Husband did not have the content of the oral order until he received an audio recording of the Court, which for unknown reasons required the District Court more than one week to produce to the Husband. The minute entries of the Nov. 17 hearing differ substantially from what was actually stated by the Commissioner at the hearing (Appellant's Brief, pg. 23, Ex. L, pg. 2.) Therefore, in order to make his objections, the Husband needed to transcribe the recording so he could refer to the text of the original oral order in making his objections

on paper, as a written form containing the accurate specifics of the order of Nov. 17 was not produced by the Court. Furthermore, at the Nov. 17th hearing the Commissioner stated grounds for the protective order that had not been previously pleaded nor argued, and the Husband was also placed in a position of responding to those. The Husband was in the process of preparing his motions containing his objections when the written order of December 19th was served upon him on December 30th, and the Husband filed his objections as rapidly as he could to both the oral and the written orders within 10 days of that service, including the objections to the enlargements the following day. The Husband's objections were delayed by both the trial court in inaccurately recording the order in the minutes and in processing delays in providing the audio recording of the hearing, and by the Wife in waiting for more than 40 days to file and serve the written form of the protective order. Furthermore, the District Court held a hearing in response to the Husband's motions and objections on Feb. 13, and did not strike nor object to the Husband's motions as untimely. Furthermore, the Husband's motions (Exs. J-N) were filed within the time limits prescribed by Rule 60(b) of the Utah Rules of Civil Procedure. The Husband submits that the objections were raised in a timely manner, and that any delays introduced were substantially the responsibility of others.

The Wife then claims that the Husband "didn't object with specificity to the Commissioner's recommendation that a permanent protective order enter", in reference to the second criteria of Badger. The Wife's argument plainly mischaracterizes the paper of January 8 as objecting only to the "format" and the "Commissioner's authority", and fails

to genuinely identify any issue that is claimed not to be raised. The Husband did not object to the "Commissioner's recommendation", because none was made, as shown above. The Husband took care to identify where the issues presented were raised in the record in his brief, in the section entitled "V. Statement of the Issues and Standard of Review." The Husband objected in the January 8 paper, "Respondent now objects to the issuance of the protective orders issued from November to the present time ..." (Ex. M pg. 4) for the reasons that "the grounds for issuing a protective order are defective and insufficient" and stating his objections with specificity (pgs. 10-17). In his Motion to Vacate Protective Orders of December 30, the Husband objected to and requested vacation of the permanent protective order on the grounds that Commissioner Patton lacked authority to issue that order under UJCRJA 6-401(4). (Ex. J pgs. 2 & 3.)

The Wife then argues that the Husband should have waited for the trial court to rule on the objections made Jan. 8 before filing a notice of appeal. As the Husband has shown, the trial court issued a final order, orally stated, on November 17 and recorded on November 21, 2008. Rule 4 of the Utah Rules of Appellate Procedure specifies that if an appeal is to be taken as a matter of right, it must be filed "within 30 days after the date of entry of the judgment or the order appealed from"; the Husband filed his notice of appeal within that 30-day period from the entry of that final order. Nothing in the rules required the Husband to "wait for the trial court to rule on this objection before filing his Notice of Appeal", and if the Husband had waited as the Wife suggests, then this appeal could not be taken as a matter of right. The delays in the filings preserving the issues are not the

Husband's responsibility, and the Wife cannot show any prejudicial effect of the times in which the objections were made. The Husband is not limited in this appeal to only the issues stated in the record at the time he filed his notice of appeal, and challenges to subsequent actions by the Court in the same matter can and should be heard by this Court in the interest of judicial economy.

2. The Husband was Denied Due Process by the Trial Court.

The Wife then argues that the Husband was not denied due process, because (1) he was not entitled to receive a copy of the broadened written protective order of December 21, 2008 before it was signed, (2) the Commissioner's lack of authority in the issuance of the protective order is not "reversible error", and (3) Utah Code § 62A-4a-201(1) does not apply. The Wife then claims that the Husband did not meet his obligations to state his contentions and reasons with necessary citations under the Utah Rules of Appellate Procedure 24(a)(9) , *Huish v. Munro* (2008 UT App 283) and *State v. Garner* (2002 UT App 234). Yet, the Wife was able to make a response to the Husband's contentions and reasoning. Even so, the Husband now replies with reference to the citations made, so as to challenge this claim.

a. The Husband was denied due process by not being afforded an opportunity to object to the enlargements in the written protective order of Dec. 19, 2008.

Although the Wife argues otherwise, the written protective order of Dec. 19 was significantly enlarged. Utah Code § 78B-7-106(3) authorizes a modification of a protective order only "after notice and a hearing". That section does not distinguish between significant and insignificant modifications, as the Wife claims. Rather, that section applies to any modification to the scope of a protective order, including modifications made in the production of a written version from an oral one. The Husband was not provided with notice nor a hearing as required by the statute, rather the written protective order was served upon him without any opportunity to review and object. The enlargements were briefed in reference to Ex. L, the Respondent's Objections filed Dec. 31st, specifically referring to the enlargements on listed in that exhibit on page two that include lack of telephone visitation with the Husband's children, lack of contact with the Petitioner for mediation, and a vague order to "provide support to family" not present in the oral order. This argument is stated on pages 22 and 23 of the Appellant's brief, and in reference to these facts, the statute and *Mathews v. Eldridge*, it is indisputable that the Husband was denied his due process rights of being heard in opposition with "notice and a hearing" to those enlargements as required by Utah Code § 78B-7-106(3). Those modifications are not "harmless" as the Wife claims in reference to *State v. Spillars*, as any difference to the scope of the final protective order issuing would

be be an effect in the outcome of the proceedings. Reversal is an appropriate remedy, particularly where the Wife failed to constrain herself to the order from the bench and further because she failed to avail herself of the procedures available by Rule 7(f)(2) of the Utah Rules of Civil Procedure to ensure there was no discrepancy in the final order.

b. The Husband was denied due process by not being afforded judicial review of the Commissioner's order.

The Wife then argues that the Husband was not denied due process because Judge Taylor signed the Nov. 17, 2008 minute entry and because Judge Laycock signed the written order of Dec. 19, 2008. The Wife then argues that this was proper procedure for the Court, and that the issuance of these orders should be affirmed. The Husband has shown above that these signature were mere ratifications prohibited by *Holm v. Smilowitz*.

The Wife then argues that the Court had no affirmative obligation to inform him that the order of Nov. 17th was a commissioner's recommendation. The Wife also argues that the Husband should have known that the order of Nov. 17th was actually a recommendation, because he is legally trained.

This is simply not a credible argument. In essence, the Wife argues that under the facts and the record at the time, the Husband should have known that the order of Nov. 17th was actually a recommendation. As shown above, the Court did not identify the

order of Nov. 17, 2008 as a commissioner's recommendation in any way, and in fact it characterized the order as a "grant". Also shown above, Commissioner Patton and Judge Taylor did not consider that order a recommendation, because the word "recommend" or it's like was not used, and further Judge Taylor signed the order four days later, well in advance of the time that the Husband's objections would have been due. If the Commissioner and the Judge could not tell that that order was a recommendation, they being lawyers having many years of legal experience, how can it be expected that the Husband, never having practiced law before a Utah court, was to identify that the order was a recommendation?

However, this point is moot, because even if the Husband had an obligation to object under URCP 7(g), the Court would still have had an obligation to provide review of a commissioner's recommendation by a judicial officer capable of exercising core judicial functions, which the Husband has shown did not occur. *State v. Thomas.*

c. The Husband was denied due process by not being afforded a fundamentally fair process under Utah Code § 62A-4a-201(1)(a) when parental interests are involved.

Appellant showed in his brief on page 28 that he was entitled to a fundamentally fair process as the parent of his children with whom his parental interests were curtailed by the protective orders, and argued that he was entitled to judical review and

consideration of his arguments, evidence, motions and the orders issuing from the Court. This point is unchallenged by the Wife.

3. The Grounds for the Protective Orders were Inadequate.

The Wife then argues that the Husband fails to "question the validity of the issuance of the underlying protective order". Although this argument is not clear, it is apparent that what the Wife claims is that because the validity of the prior "underlying" protective order dated June 11, 2008 (Ex. H) was not challenged, the Husband is precluded from challenging any subsequent protective order.

However, the protective order dated June 11, 2008, prepared by the Wife's attorney, carries the following language: "The parties expressed their desire to attempt reconciliation and the parties' stipulation anticipated that result. Pursuant to the stipulation, the Court accepted and entered the parties' stipulation without a finding of fault or an admission or finding of wrongdoing against the Respondent." (Ex. H, pg. 2.) The minute entry of May 13, 2008 states that "As per the stipulation the modified ex parte temporary protective order is to remain in full force and effect without a finding of fault until September 22, 2008 at 10:00 am. The Court instructs Mr. Bartholomew to prepare a modified ex parte temporary protective order without a finding of fault." (See the Appendix to this Brief.) The Husband does not challenge the underlying order, because it was made by stipulation and without findings of fault. The protective orders

challenged were issued on findings independent of the "underlying" protective order, stated for the first time at the November 17, 2008 hearing. The Commissioner's grounds for the protective orders of Nov. 17 and Dec. 21 did not rely on an earlier protective order, nor any prior stated grounds. The Wife's objections provide no valid ground for the disregarding of the Husband's arguments.

a. The plea in abeyance of no contest was inadmissible.

The Wife cites to UCA § 77-36-1.1(3) to show that a plea of no contest in a domestic offense is equivalent of a conviction. However, the very language quoted by the Wife restricts that equivalence "For the purposes of this section". The heading on that section is "Enhancement of offense and penalty for subsequent domestic violence offenses", and concerns only the penalties for a conviction of domestic violence. That section does not authorize a court to generally equate a plea-in-abeyance to a conviction or render that as admissible evidence otherwise. This section is not "closely analogous" as the Wife claims. Those contexts are completely different, as the context of Rule 410 of the Utah Rules of Evidence concerns the determination of findings of fact, and Utah Code § 77-36-1.1 concerns the determination of penalties after findings of fact are made, and is expressly limited to that purpose.

Although the section cited by the Wife is not applicable, this Utah Supreme Court has ruled on this issue. In *D.A. v. State of Utah*, cited by the Appellant in his brief, this

Court adopted reasoning of the federal courts with respect to pleas of nolo contendere. (63 P.3d 607, 617 (Utah 2002), referring to *Olsen v. Corriero*, 189 F.3d 52 (1st Cir. 1999.)) *Olsen* states: "... a nolo plea is not a factual admission that the pleader committed a crime. Rather, it is a statement of unwillingness to contest the government's charges and an acceptance of the punishment that would be meted out to a guilty person. ... Throughout it's history ... the plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency." (id. at 60.) "Unlike a plea of guilty, however, [a nolo plea] cannot be used against a defendant as an admission in a subsequent criminal or civil case ... A defendant who desires to plead nolo contendere will commonly want to avoid pleading guilty because the plea of guilty can be introduced as an admission in subsequent civil litigation." (id. at 60.)

The Wife argues that a plea of "no contest – plea in abeyance" is not the same as a plea of "nolo contendere." However, if the District Court were allowed to accept pleas in abeyance of nolo contendere into evidence in subsequent cases, that would destroy the purpose expressed in *D.A.* and *Olsen*, as there would be no advantage to a defendant in making that plea over a plea of guilty in a plea in abeyance. A Utah court accepted the Husband's plea of nolo contendere, and the Utah District Court here should respect the bargain that was made with the Husband that the charges against him would not be used as proof of wrongdoing, domestic violence or otherwise, in a subsequent civil action.

Commissioner Patton used the existence of a plea-in-abeyance as the needed proof "that domestic violence or abuse has occurred" as required in Utah Code § 78B-7-106. (Appellant's brief, pgs. 30-31.) Commissioner Patton's assessment fails to consider that the plea entered could be that of nolo contendere, and under Rule 410 of the Utah Rules of Evidence and *D.A. v. State of Utah*, the existence of a plea in abeyance agreement does not prove the underlying allegations of domestic violence or abuse, particularly where the defendant did not plead guilty.

b. The prior ex-parte protective order was not violated, and the Husband did not place the Wife in fear of imminent harm.

The Wife then argues that the Husband has not met his burden to show that Commissioner Patton was wrong in his assessment that he violated the modified ex-parte protective order of June 11, 2008 (Ex. C), arguing that the Husband needs to reference authority to support his position, and that he fails to marshal evidence in disputation.

The Husband marshaled the protective order itself (Ex. C) and a transcription of the portion of the November 17th hearing in which the finding was made (Ex. M, pgs. 2-3 and 11.) These were referenced in Respondent's brief on pages 31-34 in his argument, and the portion of the transcript was quoted by the Appellee in her brief on page 13. The Wife does not dispute the accuracy of these, and this Court has the case record that includes the transcription for verification. The Wife seems to argue that a statement of

"authority" is needed, such as caselaw. However, here the dispute concerns the interpretation of a non-standard, stipulated and negotiated provision in a protective order, and it is unreasonable for the Wife to require that the Husband find some comparable language in the caselaw. The evidence to be marshalled is intrinsic to the protective order itself, particularly where the Husband claims that the Commissioner's interpretation would render the document inconsistent with itself, as he has so argued.

In the light most favorable to the District Court, the Commissioner's interpretation of provision 3 that "[the Respondent] cannot interfere with her use, control and possession ... because that's what she was granted" is presumed to be correct. As the Husband showed, that interpretation cannot be correct, because it renders the additional language of provision three surplusage: ("The Respondent shall not interfere with Petitioner's use of said property, but is not prohibited from a non interfering use. The intent of this provision is to allow the Respondent to continue to care for the parties' property, participate in family events at the home and other circumstances as mutually agreed upon by the parties.") The Husband also showed that the Commissioner's interpretation cannot be correct, because it conflicts with the language regarding parent time in provision five: "As the Respondent is not presently ordered to "stay away" from the parties' home, his parent-time with the children shall be while he is at the home seeing to the property's maintenance, family events and as otherwise agreed upon by the parties'." The Wife's allegations were that the Husband was present at the house against her wishes, and the Commissioner's finding that he was in violation of the protective

order by his presence at the home without mutual agreement was dependent upon the interpretation that mutual agreement was necessary, which interpretation has been shown to be false. This is all explained in the Appellant's brief on pages 31-34, and reliance upon a clearly conflicting interpretation is clear abuse of discretion under *Uintah Basin Medical Center v. Hardy*, 2008 UT 15. The Husband marshaled the evidence required, and Wife's claims are in error.

The Wife then argues that the Husband has not met his burden to show that the Commissioner's reasoning regarding placing his wife in fear of imminent harm is incorrect. The Husband cited to the transcript in Exhibit M. As the Husband pointed out in his brief on page 34, the Commissioner did not point to an event of such. The Wife attempts to shift the burden of proof away from herself, and force the Husband to prove the negative. If the Commissioner's reasoning regarding imminent harm were valid, the Wife could simply point to a supporting event in the record and rebut the Husband's contention. The Wife's burden of proof is light, but still she fails to show that she was actually placed in fear of imminent harm, and fails to show that she even made such an allegation. This Court should conclude that the Commissioner's finding with respect to placing the Wife in fear of domestic violence is unsupported and not a proper ground for the issuance of a protective order.

None of the Commissioner's grounds for issuing a protective order withstand scrutiny, and this Court should rule them to be insufficient and the findings that domestic violence or abuse have occurred or were likely are unsupported in fact.

4. The Protective Orders were Overbroad.

The Wife then argues that the Husband's arguments are based on a misreading of UCA § 62A-4a-201(1)(b) and the Cohabitant Abuse Act, but fails to explain what is misread or in error. The Wife then argues that the Husband has not marshalled evidence nor presented argument that the trial court's findings were erroneous, despite the Appellant's extensive and complete treatment of the supporting findings from pages 29 to 39 of his brief. Neither of these claims is supported in fact. Again, the Wife attempts to shift the burden of proof to the Husband to show a negative; that he did not commit domestic violence or abuse. It is the Petitioner/Appellee's burden to show that domestic violence or abuse occurred, or is substantially likely to occur. Utah Code § 78B-7-103(1).

The Wife then argues that the protective order statute is constitutional, citing *State v. Hardy*, 2002 UT App 244, 53 P.3d 645, and then offers explanations of why the protective order statute has been sufficiently narrowly drafted. However the Husband did not claim that the statute was unconstitutional. The Husband argued that the protective orders of November 17 and December 19, 2008 were broader than what Utah Code §§ 78B-7-106(3) and 62A-4a-201(1)(b) authorized. Reciting the initial arguments in Appellant's brief, page 40: Utah Code § 78B-7-106(3) is the statute enabling a court to issue a permanent protective order, which authorizes "an order for protection". Thus, by

the statute's very language, the order must serve to protect a petitioner from a substantial and definite potential harm of abuse or domestic violence for the protection of herself and the named children. The Wife's quotation of *State v. Hardy* on page 15 of her brief contains the following: 'Without the particular relationship of "cohabitants" and without previous instances or the "substantial likelihood" of domestic violence or abuse, the court may not restrict the protective order respondent's right to speak and associate freely' because 'it is narrowly drafted to "burden no more speech than necessary to serve a significant government interest."' *Hardy* illustrates the Husband's argument precisely: the statute is constitutional because it limits the restrictions that can be placed on a protective order respondent's rights to the restrictions that can be shown to serve the governmental interest of protecting the health and well-being of its citizens. A court does not have full discretion to order any protective order desired; a protective order that issues must be bounded to that which provides some protective purpose as shown by the evidence proffered. See also *Bailey v. Bayles*, 2001 UT App 34 and *Strollo v. Strollo*, 828 P2d 532, referenced in the Appellant's brief at page 40.

The Wife offers no argument that a protective order can be issued beyond what is needed for a petitioner's protection, and fails to counter the reasoning stated in the Appellant's brief on pages 40-44 that specific orders do not protect the Wife from domestic violence or abuse, or a substantial likelihood thereof. If there were such reasoning, the Wife could simply point to the record showing previous instances or the

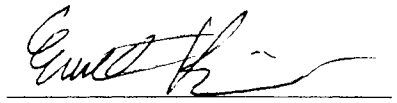
substantial likelihood of domestic violence or abuse under the standard in *Hardy*, but fails to do so.

5. The Husband is Entitled to a Protective Order.

The Wife then argues that the Husband is not entitled to a protective order because he "never filed his own, separate request for protective order under a separate case number", with reference to UCA § 78B-7-108 requiring the filing of an independent petition. That statute requires only an independent petition, not an independent case. The Husband filed an independent petition on September 18, 2008 (Ex. G) which was well in advance of the November 17th hearing. The Husband filed his petition in the same case because the set of facts presented in rebuttal to his wife's petition were substantially the same, and Husband filed his petition in the same case for the purpose of the convenience of the District Court. The Husband was entitled to have his petition heard and ruled upon.

VI. Conclusion

Appellant maintains his requests made in his earlier brief.



Everett D. Robinson
Pro Se

Date: October 12, 2009

VII. Appendix: Minute Entry of May 13, 2008

FILED
Fourth Judicial District Court
of Utah County, State of Utah
MAY 13 2008 Deputy

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

COMPLETED
5-14-08 mw

JODY G ROBINSON, Petitioner,	:	MINUTES ORDER OF CONTINUANCE NOTICE
vs.	:	Case No: 084400917 CA
EVERETT D ROBINSON, Respondent.	:	Commissioner: THOMAS PATTON Date: May 13, 2008

Clerk: ashleyh

PRESENT

Petitioner's Attorney: AARON S BARTHOLOMEW
Petitioner(s): JODY G ROBINSON
Respondent(s): EVERETT D ROBINSON
Audio
Tape Number: 08-09-303 Tape Count: 11:27-11:37

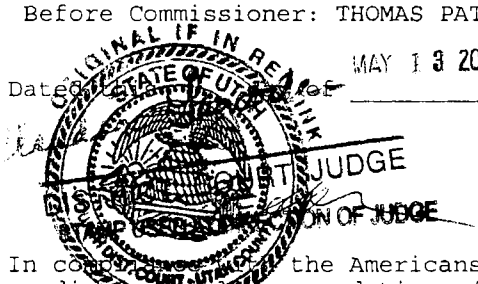
HEARING

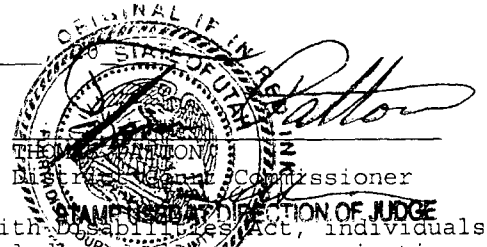
TAPE: 08-09-303 COUNT: 11:27
The petitioner is present and appears with counsel. The respondent is present and appears pro se. The parties have reached a stipulation. Mr. Bartholomew reads the stipulation into the record. Mr. Robinson supplements. The Court questions the party to clarify the terms of the stipulation. Both parties are asked if they heard, understand, and agree to be bound by the terms of the the stipulation. Both parties answer yes. The Court accepts the stipulation of the parties.
As per the stipulation the modified ex parte temporary protective order is to remain in full force and effect without a finding of fault until September 22, 2008 at 10:00 am. The Court instructs Mr. Bartholomew to prepare a modified ex parte temporary protective order without a finding of fault.

Case No: 084400917
Date: May 13, 2008

REVIEW HEARING is scheduled.
Date: 09/22/2008
Time: 10:00 a.m.
Location: Third floor, Rm 303
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Commissioner: THOMAS PATTON

Dated this MAY 13 2008





THOMAS PATTON
District Court Commissioner

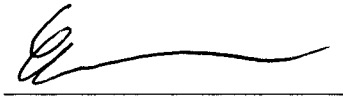
In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) should call TERI at (801)429-1112 at least three working days prior to the proceeding. (For TTY service call Utah Relay at 1-800-346-4128 or 711) The general information phone number is (801)429-1000.

CERTIFICATE OF SERVICE

I certify that a copy of the attached Reply Brief of the Appellant was served upon the following parties listed below by mailing it by first class mail, personal delivery, or fax to the following addresses:

Name:	Jody G. Robinson, Petitioner	Sent Via:
Address:	as represented by Patricia K Abbott, Esq.	X Mail (postage prepaid)
	455 North University Avenue, Suite 100	___ Personal Delivery
	Provo, UT 84601	___ Fax #_____

Name:	Kelly Fry Glasser, Esq.	Sent Via:
Address:	Office of the Guardian ad Litem, Fourth District	X Mail (postage prepaid)
	32 West Center Street, Suite 205	___ Personal Delivery
	Provo, Utah 84601	___ Fax #_____

By: 

Everett D. Robinson
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(801)-649-5858

Date: Oct. 13, 2009